Supreme Court, U.S.
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No. 97-1406

In The

Supreme Court of the United States

October Term, 1997

KEVIN M. KIRLIN,

Petitioner,

vs.

IOWA SUPREME COURT BOARD OF PROFESSIONAL ETHICS & CONDUCT,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether Petitioner, an Iowa lawyer who has been disciplined for violation of certain ethics rules concerning lawyer advertising, has standing to assert a First Amendment challenge to other advertising restrictions that were not involved in the charges and discipline below.

2. Whether a limited restriction on a lawyer's eligibility to advertise his or her practice in particular areas of the law, which is designed to protect the public from misleading or potentially misleading advertisements, warrants review by this Court in light of the record made below.

3. Whether Petitioner has shown a compelling reason for this Court to review the Iowa court's determination that it is reasonable and constitutional to require lawyers who advertise their membership in professional associations to include a disclaimer in their advertisements.

4. Whether Petitioner has properly presented a question for this Court's review with respect to a restriction on the number of areas of practice that may be listed in a lawyer's advertisement, and, if so, whether he has shown a compelling reason for this Court to review the Iowa court's determination that the numerical restriction is reasonable and constitutional.

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STATEMENT OF JURISDICTION

Petitioner has failed to show jurisdiction in this Court with respect to all of the questions he presents for review. In particular, there is no case or controversy here with respect to Petitioner's attacks on a provision in Iowa Code of Professional Responsibility for Lawyers DR 2-105(A)(2), which specifies particular areas of the law that may be mentioned in advertisements, and a provision in DR 2-105(A)(3), which specifies prefatory language for listing areas of practice.

Petitioner's assertion that the Board *charged* him with "listing a field of practice in the November 1994 directory which was not approved by the Supreme Court of Iowa" (Pet. i) is a misrepresentation. The Supreme Court of Iowa correctly summarized the charges against Petitioner as follows: "The [Board] alleges that (1) he failed to comply with [practice and training] rules requiring information to be filed, prior to advertising, with our Commission on Continuing Legal Education, (2) he failed to include cautionary statements in his ads, and (3) he listed more than the three areas of practice permitted by the rules." (Pet. App. 2.) The Board did not charge Petitioner with advertising practice in a field that was not approved. (See Complaint, App. below 1-3.)

Nor is it accurate to suggest, as Petitioner does, that the Iowa court *disciplined* him for listing a field of practice which was not approved. (Pet. i.)

Consequently, there is no case or controversy here regarding the area of practice descriptions specified in DR 2-105(A)(2). Stated differently, Petitioner lacks standing to challenge a provision that was not involved in the

charges against him. Fundamental principles of standing include the recognition that "constitutional rights are personal and may not be asserted vicariously" and that "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830, 839 (1973). "Constitutional judgments . . . are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court[.]" *Id.* at 611, 93 S.Ct. at 2915, 37 L.Ed.2d at 839.

Petitioner presumably will rely here, as he did below, on an exception to traditional standing principles in the area of the First Amendment, allowing litigants to challenge a restriction on speech "not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *See Broadrick, id.* at 612, 93 S.Ct. at 2916, 37 L.Ed.2d at 840.

This Court has made clear, however, that the First Amendment standing exception does not apply to *commercial* speech, and, in particular, to professional advertising. In *Bates v. State Bar of Arizona*, 433 U.S. 350, 380-81, 97 S.Ct. 2691, 2707-08, 53 L.Ed.2d 810, 834 (1977) and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 n. 20, 98 S.Ct. 1912, 1922 n. 20, 56 L.Ed.2d 444, 457-58 n. 20 (1978), the Court noted that commercial speech is more hardy than other forms of speech and does not need surrogate litigators.

Petitioner similarly lacks standing to challenge a provision in Iowa Code of Professional Responsibility for Lawyers DR 2-105(A)(3), which states that the listing of a practice area in an advertisement shall be preceded by the words "practice limited to" or "practicing primarily in." As Petitioner notes, the Iowa court did not address his challenge to DR 2-105(A)(3). (Pet. 16.) The court had no reason to. Petitioner was not charged with violating this rule. Therefore, no case or controversy is present with respect to DR 2-105(A)(3) and Petitioner lacks standing to challenge its constitutionality in this Court. *See Street v. New York*, 394 U.S. 576, 581-82, 89 S.Ct. 1354, 1360, 22 L.Ed.2d 572, 579 (1969) (standing requires that question was presented to lower court in such manner that it was necessarily decided by that court).

Finally, this is not a case where Petitioner can claim standing with respect to matters not involved in the charges on the ground that he would be unable to assert his claims without violating the rules and facing discipline. The Iowa Supreme Court has provided a safe harbor administrative procedure for lawyers in Petitioner's situation. One who wishes to challenge or change the advertising rules may request that the Board recommend changes to the Iowa Supreme Court. If the Board rejects the request, the lawyer may take exception thereto, in which case the matter is forwarded to the Iowa Supreme Court for its determination. Ethics and Conduct Rule 5.1 *et seq.* (Resp. App. 1.) *See Iowa Supreme Court Board of Prof'l Ethics & Conduct v. Wherry*, 569 N.W.2d 822, 827 (Iowa 1997), *cert. denied*, ___ U.S. ___ (No. 97-1200, Mar. 23, 1998). Petitioner has had the right to utilize this procedure but has elected not to do so. (Pet. App. 16.) He

does not have standing to obtain review of questions he has elected not to present properly to the court below.

In short, Petitioner has standing to challenge only those portions of the advertising rules for which he was disciplined.

STATEMENT OF THE CASE

This case arises from a disciplinary action brought against Petitioner by the Board, alleging specific violations of the Iowa Code of Professional Responsibility for Lawyers. Contrary to Petitioner's suggestion, the Iowa Supreme Court in deciding the case did not resolve the constitutionality of Iowa's lawyer advertising rules in general. The Iowa court considered and determined the constitutionality of only those provisions of the rules that were implicated in the charges against Petitioner. (Opinion, Pet. App. 1-10.)

The general factual background is uncomplicated and is summarized in the opinion of the Iowa Supreme Court. (Pet. App. 2).

Petitioner's characterization of the Iowa advertising rules in general as "abolitionist" (Pet. 24-25) is hyperbole. Petitioner use of the term comes from a passage in an American Bar Association study which, in context, focused largely on electronic media advertising. ABA Commission on Advertising *Lawyer Advertising at the Crossroads* 106 (1995). The Iowa rule governing electronic media advertisements is not at issue here. With respect to

print media, any claim that the Iowa rules are "abolitionist" is belied by Petitioner's own offer into evidence of page after page of lawyer advertisements from an Iowa telephone directory. (Ex. BB and CC below.)

Petitioner's assertion that it is "certain" that Iowa's rules have "a profoundly chilling effect on the use of advertising by Iowa lawyers" is likewise unwarranted. (Pet. 22.) The only evidence he cites in support of this "certainty" is a survey, with conclusions by two law students, comparing advertising by Iowa and Wisconsin lawyers. Jim Rossi & Mollie Weighner, *An Empirical Examination of the Iowa Bar's Approach to Regulating Lawyer Advertising*, 77 Iowa L. Rev. 179 (1991). Like the ABA study, the law review article's conclusions are not specific to the particular rules involved here. Moreover, the objective findings reported in the article prove only that Iowa lawyers' attitudes toward advertising differ from those of Wisconsin lawyers. The survey results showed that only about twenty-five percent of lawyers in Iowa believe lawyer advertising is in the best interests of the public and fewer than twenty percent believe it is in the best interests of the legal profession. *Id.* at 247-48. Unlike Wisconsin lawyers, a majority of Iowa lawyers say they would not advertise even if convinced that advertising would increase the volume of their legal business. *Id.* at 248. The Iowa lawyers in the survey were not asked whether the state's advertising rules discouraged them from advertising. *See id.* at 259-68 (attorney questionnaire).

Even the most restrictive of the rules violated by Petitioner – the rule requiring that a lawyer meet eligibility requirements before advertising areas of practice –

is in no way a *ban* on such advertising. In fact, the number of Iowa lawyers who have qualified to place such ads has grown annually (from 96 in 1986 to 527 in 1996). (App. below 34.)

REASONS FOR DENYING THE WRIT

I. Petitioner lacks standing to challenge the constitutionality of provisions of the Iowa lawyer advertising rules that were not implicated in the charges against him.

For the reasons discussed above in the Statement of Jurisdiction, Petitioner lacks standing to assert a constitutional challenge to provisions of rules governing the terminology under which areas of practice may be advertised by lawyers and requiring that an area of practice listing be preceded by the words "practicing primarily in" or "practice limited to." *See* Iowa Code of Professional Responsibility for Lawyers DR 2-105(A)(2) and (3). (Pet. 5-7). Petitioner was not charged by the Board with violating these provisions, nor was he disciplined for any such violations. Thus, there is no compelling reason, let alone jurisdiction, for this Court to consider these matters.

II. The limited restriction on a lawyer's eligibility to advertise practice in particular areas of law is reasonable under the First Amendment and does not warrant this Court's review.

Petitioner contends that his First Amendment rights have been infringed by the requirement that a lawyer

meet certain practice and education requirements – and so certify to the Continuing Legal Education Commission of the Iowa Supreme Court – before advertising practice in a particular area of the law. *See* DR 2-105(A)(4). (Pet. 8-9.)

On March 23, 1998, this Court denied certiorari in a case involving the same constitutional challenge to the eligibility requirements of DR 2-105(A)(4) raised by Petitioner herein. *See Iowa Supreme Court Board of Professional Ethics & Conduct v. Wherry*, 569 N.W.2d 822 (Iowa 1997), *cert. denied*, ___ U.S. ___ (No. 97-1200, Mar. 23, 1998). As in *Wherry*, there is no compelling reason for this Court to review the Iowa court's decision with respect to the constitutionality of DR 2-105(A)(4).

The rule is designed to protect the public interest in informed (as opposed to misinformed) selection of counsel. *See Wherry*, 569 N.W.2d at 825. The record below shows that the rule reasonably fits this interest.

A review of Iowa's advertising rules in 1988 included the finding by a special master (based largely on a survey of consumers) that "the public, in relying on listings of fields of practice, assumes that the attorney has additional education and expertise in the advertised field of practice." (App. below 79-80, 105.) The Iowa court adopted DR 2-105(A)(4) "in the hope it would bring a measure of reality to this assumption." *Wherry*, 569 N.W.2d at 826.

The result of misinformed selection of counsel based on an area of practice advertisement is shown by *Committee on Prof'l Ethics & Conduct v. Morris*, 490 N.W.2d 806

(Iowa 1992). Morris was a lawyer who listed "immigration law" in his yellow-page ad. A Canadian national relied on this ad to hire him "to represent her in appealing the denial of her petition to the commissioner of the INS and in obtaining temporary work authorization." *Id.* at 806-07. Morris, however, had not met the eligibility requirements of DR 2-105(A)(4) for listing areas of practice and had little experience in immigration law. 490 N.W.2d at 808. He failed to take the steps necessary to protect his client's interests. As a result, she was arrested while on the job and forced to "voluntarily" leave the country in lieu of deportation. *Id.* at 807.

The Iowa court was not required to find that Petitioner himself provides unsatisfactory representation to those who hire him on the basis of his area of practice advertisements. To uphold a restriction on commercial speech it is unnecessary to prove that the "particular conduct in fact trenched on the interests that the regulation sought to protect" or that "the state interests supporting the rule actually were advanced by applying the rule in [a] particular case." *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 431, 113 S.Ct. 2696, 2706, 125 L.Ed.2d 345, 358 (1993).

Petitioner criticizes the Iowa court's failure to "discuss whether any less burdensome alternatives exist which would remedy the allegedly misleading representations of specialization." (Pet. 22.) In particular, he points to the court's failure to address the efficacy of disclaimers. The evidence below, however, shows that disclaimers are better viewed as a complement than as an alternative to the eligibility requirements. A review of Iowa's advertising rules conducted in 1988 shows that

while most consumers find the disclaimers understandable, many consumers do not bother to read them. (App. below 107.) Disclaimers alone, therefore, cannot be said to eliminate the potential for misinformation in the selection of counsel.

Moreover, a restriction on commercial speech need not be a perfect fit, the best disposition, or the least restrictive means of protecting a governmental interest. *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 3034-35, 106 L.Ed.2d 388, 403-04 (1989). Under the record made below, the eligibility requirement of DR 2-105(A)(4) is a reasonable step to prevent misinformation and presents no compelling reason for review by this Court.

III. There is no compelling reason for this Court to review the constitutionality of a reasonable disclaimer requirement in lawyer advertisements referring to membership in professional associations.

In his yellow-pages display advertisements, Petitioner prominently publicizes his memberships in various professional associations. (Pet. App. 32, 33.) He challenges the constitutionality of an Iowa rule requiring him to include a disclaimer informing the public that such memberships "do not mean that a lawyer is a specialist or expert in a field of law, nor do they mean that such lawyer is necessarily any more expert or competent than any other lawyer." DR 2-101(C). (Pet. 4.) The disclaimer requirement is reasonable and presents no compelling basis for review by this Court.

This Court has voiced approval of disclosure or disclaimer requirements in lawyer advertising. *See Peel v. Attorney Reg. & Disciplinary Comm'n*, 496 U.S. 91, 110, 110 S.Ct. 2281, 2292, 110 L.Ed.2d 83, 100 (1990) (plurality opinion) (recognizing that state may require disclaimer to counteract potentially misleading ad content); *Bates*, 433 U.S. at 375, 97 S.Ct. at 2704-05, 53 L.Ed.2d at 830 ("preferred remedy" for potentially misleading advertising "is more disclosure, rather than less"). In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651, 105 S.Ct. 2265, 2282, 85 L.Ed.2d 652, 673 (1985), the Court upheld an Ohio disclosure rule, stating that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."

Petitioner claims that the DR 2-101(C) disclaimer is duplicative of other disclaimers. As the Iowa court correctly found, however, "[t]he warnings under DR 2-101(C) and DR 2-101(A) . . . have different purposes. The warning required by DR 2-101(C) cautions the consumer not to give undue weight to membership in associations; DR 2-101(A) warns consumers not to be swayed by advertising in selecting a lawyer." (Opinion, Pet. App. 6.) The concern is that a lawyer will imply expertise merely by joining an organization and listing that organization in his or her advertisement. (Opinion, Pet. App. 7.)

Interestingly, Petitioner has made no claim that his own membership in various associations makes him any more competent in the fields of law in which he practices. *Cf. Peel v. Attorney Disciplinary Comm'n of Illinois*, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990) (striking down

prohibition on advertisement of trial advocacy certification based on demonstrated experience, participation in approved programs, and successful completion of examination). He has failed to present a compelling reason why this Court should review his discipline for violation of the disclaimer requirement.

IV. Petitioner has failed to properly present for consideration a challenge to a restriction on the number of areas of practice a lawyer may advertise, and has otherwise failed to show a compelling reason for this Court to review the Iowa court's determination that the limitation is reasonable.

Petitioner was disciplined for violating a provision in DR 2-105(A)(2) limiting to three the number of areas of practice that one lawyer may advertise. Petitioner has not properly presented this matter for review, since he does not mention it in his statement of "Questions Presented." (Pet. i.) *See* Supreme Court Rule 14(1)(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Assuming for argument's sake only that he has properly made a request for review, he has failed to explain why this Court should grant it.

The Iowa court correctly found that Petitioner did not develop an argument in support of his challenge to the numerical limitation. (Pet. App. 8.) In disputing this finding, Petitioner refers only to his *reply* brief below, which he includes as an appendix to the Petition. (Pet. 15; Pet. App. 25-31.) As he implicitly admits, he did not develop an argument on this matter in his initial appellate brief to the Iowa court. The reply brief does mention

the limitation in passing (Pet. App. 27, 28), but focuses instead on the terminology specified in DR 2-105(A)(2) for describing areas of practice. The reply brief cannot fairly be said to develop an argument explaining why the numerical limitation should be held unconstitutional. Petitioner should not be allowed to develop his argument for the first time before this Court.

The decision of the Iowa court to limit the number of advertised areas of practice to three is supported by the 1988 Magid study, which found that over seventy percent of consumers surveyed believe "the law today is so complicated that an individual lawyer can specialize in only one or two areas." (App. below 106.) The Iowa court concluded "[t]here is a limit to the number of areas in which an attorney may reasonably claim to concentrate, and we believe that three is reasonable." (Opinion, Pet. App. 8.) Statistics support the Iowa court's conclusion. Of the 527 Iowa lawyers currently meeting the eligibility requirements, over half (280) qualify to list only one area, barely a third (174) list two fields, and fewer than fifteen percent (73) qualify to list three areas. (App. below 34.)

This Court has allowed the states leeway in drawing reasonable lines to regulate professional advertising, even though the lines may not be a perfect fit. *Cf Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632-33, 115 S.Ct. 2371, 2380, 132 L.Ed.2d 541, 554-55 (1995) (approving 30-day ban on solicitation letters to accident victims as reasonably well-tailored to problem of offensive mailings). Petitioner has failed to demonstrate why this Court should

review the judgment below with respect to the numerical limitation rule.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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RULES OF PROCEDURE OF THE IOWA SUPREME COURT BOARD OF PROFESSIONAL ETHICS AND CONDUCT

* * *

5.1. Any member of the bar desiring to expand the information authorized for disclosure pursuant to the provisions of DR 2-101 or DR 2-105, Iowa Code of Professional Responsibility for Lawyers, or to provide for its dissemination through forums other than therein authorized or otherwise to change those rules, may apply to the board. Such application shall be made in writing by restricted certified mail, and shall include such documentation as the applicant deems appropriate. The board thereafter shall determine, on the basis of documentation at hand, further investigation, or whatever hearings it deems to be necessary, whether all or any part of the proposal is necessary in the light of existing provisions of the code, accords with the standards of accuracy, reliability, and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services. [Court Order May 18, 1978; December 15, 1994, effective January 3, 1995]

5.2. If the board is of the opinion that no relief should be granted in response to any such application and no changes are necessary, it shall make a determination to that effect and then shall proceed as provided hereinafter. [Court Order May 18, 1978; December 15, 1994, effective January 3, 1995]

5.3. If the board concludes that relief should be granted in response to such application, it shall make its determination to that effect and submit the same to the

supreme court by filing the same with the clerk of the court as a recommended amendment to the Iowa Code of Professional Responsibility for Lawyers, universally applicable to all lawyers admitted to practice in Iowa. [Court Order May 18, 1978; December 15, 1994, effective January 3, 1995]

5.4. Within ten days after the board has made its determination under paragraphs 5.1 and 5.2 hereinabove, it shall notify applicant of its determination by furnishing said applicant a copy thereof by restricted certified mail. Applicant shall have 30 days from the date of the said mailing by the board to the applicant to take exception to all or any part of the determination of the board. Said exceptions shall be taken by filing with the board within said thirty-day period, complete written notice and documentation of the exceptions and the reasons therefor, which shall be forwarded to the board by restricted certified mail. [Court Order May 18, 1978; December 15, 1994, effective January 3, 1995]

5.5. Within 30 days from the receipt of the exceptions, the board shall file with the clerk of the court a copy of said exceptions and documentations attached thereto, together with any written response which the board seeks to make to the court together with a certification of its mailing to the applicant a copy of its response to the exceptions, in order that the court may determine the whole matter, with or without hearing, as to the court may appear appropriate and desirable. [Court Order May 18, 1978; December 15, 1994, effective January 3, 1995]